STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
White, P.J. and Wilder and Zahra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 120205

-vs-

ONE MILLION NINE HUNDRED TWENTY-THREE THOUSAND TWO HUNDRED THIRTY-FIVE DOLLARS AND SIXTY-TWO CENTS ($1,923,235.62) IN UNITED STATES CURRENCY,
Defendant,
and

MEGABOWL, INC., PAM ENTERPRISES, INC., ALBERT ANSELMI, JEFFREY MAZZA, RUDY MAZZA, BETTY PUERTAS, JOSEPH B. PUERTAS, CHRISTOPHER PUERTAS, STEVEN PUERTAS, B.J. VENDING, INC., JOSEPH B. PUERTAS, INC., AREA CODE 313, INC., STIX A BILLIARD ROOM, INC., and MICHAEL MAZZA,
Claimants-Appellees.
/

Court of Appeals No. 218153
Oakland County Circuit Court No. 97-002514 CF
/

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

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STATEMENT OF JURISDICTION

This Court entered an Order (86a) on April 30, 2002, granting Plaintiff-Appellant's application for leave to appeal from a Published Opinion of September 25, 2001, of the Michigan Court of Appeals (White, P.J., and Wilder and Zahra, J.J.). (81a -85a). The Court of Appeals reversed an Opinion And Order of February 22, 1999, of the Honorable Nanci, J. Grant, Oakland County Circuit Court Judge. (79a -80a). The trial court's Opinion And Order held that assets which are the subject of a forfeiture action pursuant to both the Controlled Substances Act and the Criminal Enterprises Act may not be released for the purpose of paying the Claimants' attorney fees. The Opinion of the Court of Appeals held that the assets should be released to pay reasonable attorney fees as a result of legal representation for the Claimants in the action under the Criminal Enterprises Act.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT RULED CORRECTLY THAT ASSETS WHICH ARE THE SUBJECT OF A FORFEITURE ACTION PURSUANT TO BOTH THE CONTROLLED SUBSTANCES ACT AND THE CRIMINAL ENTERPRISES ACT MAY NOT BE RELEASED FOR THE PURPOSE OF PAYING THE CLAIMANTS' ATTORNEY FEES?

The trial court answered this question "Yes."

The Court of Appeals answered this question "No."

Plaintiff-Appellant answers this question "Yes."

Claimants-Appellees will answer this question "No."

II. WHETHER MCL 750.159m(6) REQUIRES A COURT, PRIOR TO THE FINAL FORFEITURE DETERMINATION, TO GRANT A MOTION TO RETURN SEIZED PROPERTY TO PAY REASONABLE ATTORNEY FEES?

The trial court answered this question "No."

The Court of Appeals answered this question "Yes."

Defendant-Appellant answers this question "No."

Claimants-Appellees will answer this question "Yes."

STATEMENT OF FACTS

Plaintiff-Appellant has pending against the Claimants-Appellees a forfeiture action in the Oakland County Circuit Court. The present case is a consolidation of two separate, but related, forfeiture cases involving the Appellees. The consolidated cases are assigned to the Honorable Nanci J. Grant. Oakland County Case No. 97-002514-CF was a forfeiture action filed pursuant to MCL 333.7521 of the Controlled Substances Act. Oakland County Case No. 98-003343-CF was a forfeiture action filed pursuant to MCL 750.159m of the Criminal Enterprises Act, also referred to as C.E.A.

The People's forfeiture action seeks to forfeit to the government assets valued approximately at 3.5 million dollars. Approximately 1.9 million dollars in cash of that total was seized from several locations pursuant to judicially authorized search warrants on December 16, 1998. The remaining assets are frozen in accounts bearing interest pursuant to judicially authorized warrants or orders. Oakland County Case No. 98-157485-FH is a pending criminal case which is closely related to this civil case. In the criminal case, Defendant's Joseph E. Puertas and James Talley were convicted by a jury of drug delivery and Criminal Enterprises charges with Oakland County Circuit Court Judge Colleen A. O'Brien presiding. The trial court subsequently granted the Defendants a new trial. The People have appealed the granting of the new trial to the Michigan Court of Appeals. The appeal in the criminal case is People v Puertas and Talley, No. 224173. That case has been briefed and argued in the Court of Appeals and is awaiting decision.

In this forfeiture case, Judge Grant entered an Opinion And Order (79a -80a) on February 23, 1999, in which she reversed an earlier ruling and held that assets which are the subject of a

forfeiture action pursuant to both the Controlled Substances Act and the Criminal Enterprises Act may not be released for the purpose of paying the Claimant's attorney fees. The Court of Appeals granted the Claimants' application for an interlocutory appeal from the Opinion and Order of February 23, 1999 of the trial court.

The Court of Appeals entered a published opinion in this case on September 25, 2001. In Re Forfeiture Of $1,923,235, 247 Mich App 547 (2001). (81a -85a). The opinion of the Court of Appeals (White, P.J., and Wilder and Zahra, JJ.) reversed the decision of the trial court and remanded this case back to the trial court with instructions to award to the Claimants reasonable attorney fees as to the legal work done concerning the forfeiture action brought pursuant to the Criminal Enterprises Act. The People filed an Application For Leave To Appeal with this Court. This Court entered an order granting leave to appeal on April 30, 2002. (86a). In that order granting leave to appeal, this Court directed the parties to brief the issue of "whether MCL 750.159m(6) requires a court, prior to the final forfeiture determination, to grant a motion to return seized property to pay reasonable attorney fees." The People now file their Appellant's Brief in this case including the issue which this Court directed the parties to brief.

SUMMARY OF ARGUMENT

The trial court ruled correctly that assets which are the subject of a forfeiture action pursuant to both the Controlled Substances Act and the Criminal Enterprises Act may not be released to pay the Claimants' attorney fees. The Court of Appeals erred as a matter of law in reversing the decision of the trial court. The People preserved this issue by opposing the release of the assets in the proceedings in the trial court and in the Court of Appeals. The People submit for the reasons set forth below that the decision of the trial court concerning this question of law was correct and that the Court of Appeals erred in reversing the decision of the trial court.

The People contend that the position advocated by Claimants and accepted by the Court of Appeals is erroneous for two reasons. First, MCL 750.159v establishes unequivocally that the filing of one forfeiture complaint or count under the Criminal Enterprises Act cannot preclude the People from attempting to forfeit the property under the provisions of the Controlled Substances Act, MCL 333.7521 et. seq. Thus, property that might not be subject to forfeiture under the Criminal Enterprises Act can still be forfeited if it falls within the property subject to forfeiture under MCL 333.7521.

Second, the People contend that to determine the Legislature's intent in enacting MCL 750.159m(6), the subparagraph which Claimants argue permits the depletion of seized assets prior to trial, that intent must be considered in context with the other subparagraphs of Section 159m. The other subparagraphs in that section identify categories of claimants who might have claims to property utilized by racketeers to violate the Criminal Enterprises Act. Those other subparagraphs also specify and determine whether the other claimants will prevail *depending on*

their lack of knowledge, lack of consent, or whether they actually participated in the illegal acts. Subparagraph six establishes attorneys as a separate class of claimants, and eliminates the requirement, applicable to most other claimants (bona fide transferees), that lack of knowledge of the illegal source of funds is a prerequisite to preventing forfeiture of funds which the law firm has received as payment for legal services. Therefore, although MCL 750.159m establishes that attorneys can protect funds they have received, even with knowledge that those funds may be from illegal sources that would be subject to forfeiture if the funds had been transferred to non-attorneys, it does not create a new right to lay claim to cash or funds that the Government has already seized or frozen pursuant to court order.

The People contend that the depletion of forfeitable assets to benefit defense lawyers is so inconsistent with the goals and purposes described in the Senate and House reports that it cannot reflect the intent of the Legislature in enacting the statute.

ARGUMENT

I. THE TRIAL COURT RULED CORRECTLY THAT ASSETS WHICH ARE THE SUBJECT OF A FORFEITURE ACTION PURSUANT TO BOTH THE CONTROLLED SUBSTANCES ACT AND THE CRIMINAL ENTERPRISES ACT MAY NOT BE RELEASED FOR THE PURPOSE OF PAYING THE CLAIMANTS' ATTORNEY FEES.

A. Introduction

The trial court ruled correctly that assets which are the subject of a forfeiture action pursuant to both the Controlled Substances Act and the Criminal Enterprises Act may not be released to pay the Claimants' attorney fees. The Court of Appeals erred as a matter of law in reversing the decision of the trial court. The People preserved this issue by opposing the release of the assets in the proceedings in the trial court and in the Court of Appeals. **The standard of review for this question of law is de novo review. People v Sierb, 456 Mich 519; 522 (1998).** The People submit for the reasons set forth below that the decision of the trial court concerning this question of law was correct and that the Court of Appeals erred in reversing the decision of the trial court.

The People contend that the position advocated by Claimants and accepted by the Court of Appeals is erroneous for two reasons. First, MCL 750.159v establishes unequivocally that the filing of one forfeiture complaint or count under the Criminal Enterprises Act cannot preclude the People from attempting to forfeit the property under the provisions of the Controlled Substances Act, MCL 333.7521 et. seq. Thus, property that might not be subject to forfeiture under the Criminal Enterprise Act can still be forfeited if it falls within the property subject to forfeiture under MCL 333.7521.

Second, the People contend that to determine the Legislature's intent in enacting MCL 750.159m(6), the subparagraph which Claimants argue permits the depletion of seized assets

prior to trial, that intent must be considered in context with the other subparagraphs of Section 159m. The other subparagraphs in that section identify categories of claimants who might have claims to property utilized by racketeers to violate the Criminal Enterprises Act. Those other subparagraphs also specify and determine whether the other claimants will prevail *depending on their lack of knowledge, lack of consent, or whether they actually participated in the illegal acts.* Subparagraph six establishes attorneys as a separate class of claimants, and eliminates the requirement, applicable to most other claimants (bona fide transferees), that lack of knowledge of the illegal source of funds is a prerequisite to preventing forfeiture of funds which the law firm has received as payment for legal services. Therefore, although MCL 750.159m establishes that attorneys can protect funds they have received, even with knowledge that those funds may be from illegal sources that would be subject to forfeiture if the funds had been transferred to non-attorneys, it does not create a new right to lay claim to cash or funds that the Government has already seized or frozen pursuant to court order.

The People contend that the depletion of forfeitable assets to benefit defense lawyers is so inconsistent with the goals and purposes described in the Senate and House reports that it cannot reflect the intent of the Legislature in enacting the statute.

B. The Trial Court Ruled Correctly That As A Matter Of Law Assets Which Have Been Seized By The Government And Are The Subject Of A Forfeiture Action Brought Pursuant To MCL 333.7521 Of The Controlled Substances Act May Not Be Released To Pay The Attorney Fees For The Defense Of Any Forfeiture Action.

The trial court ruled correctly that assets which have been seized by the Government and are the subject of a forfeiture action brought pursuant to MCL 333.7521 of the Controlled Substances Act may not be released to pay the attorney fees for the defense of any forfeiture action. The initial complaint in this forfeiture case was brought pursuant to MCL 333.7521 of

the Controlled Substances Act. A subsequent complaint was brought pursuant to MCL 750.159m of the Criminal Enterprises Act. The two complaints were eventually consolidated. The forfeiture provisions of the Controlled Substances Act have no provision which excludes attorney fees from forfeiture. If the trial court finds that the assets subject to the forfeiture are the proceeds of violations of the Controlled Substances Act, all of the assets will be forfeited to the People. As long as the forfeiture complaint based upon the Controlled Substances Act is pending, all of the seized assets, including potential attorney fees, should be maintained intact for payment to the rightful owner.

The People's position in that regard is supported by language contained in MCL 750.159v of the Criminal Enterprises Act. That provision states as follows:

> "**750.159v. Pursuit of forfeiture proceedings under other laws of the state.**
>
> Sec. 159v. This chapter does not preclude a prosecuting agency from pursuing a forfeiture proceeding under any other law of this state." MCL 750.159v.

As set forth above, the Criminal Enterprises Act expressly allows the People to pursue a forfeiture pursuant to other laws besides the Criminal Enterprises Act.

The forfeiture sections of the Controlled Substances Act, MCL 333.7521 et seq., have no provision which excludes attorney fees from forfeiture. When the Legislature has not included an exception for attorney fees in the pertinent statute, the trial courts should not rewrite the statute to create one. Caplin & Drysdale, Chartered, v United States, 491 U.S. 617 (1989); U.S. v Monsanto, 491 U.S. 600 (1989). If the trial court finds that the assets are subject to forfeiture as the proceeds or instrumentalities of violations of the Controlled Substances Act, all of the assets will be forfeited to the People.

In State ex rel Thornburg v $52,029 et al, 324 N.C 276, 378 S.E. 2d 1 (1989), the North Carolina Supreme Court analyzed whether a RICO civil forfeiture statute took precedence over that state's controlled substances statute. The RICO statute included a provision that is analogous to MCL 750.159v:

> "The application of one civil remedy under this Chapter shall not preclude the application of any other remedy under this chapter or any other provision of law. Civil remedies under this Chapter are cumulative, supplemental and not exclusive, and are in addition to the fines, penalties and forfeitures set forth in a final judgement of conviction of a violation of the criminal laws of this state as punishment for violation of the penal laws."
> N.C. Gen Stat. § 75D-10 (1997)

North Carolina's Controlled Substances Act is substantially similar to Michigan's Controlled Substances Act. The North Carolina Supreme Court construed the above statute to mean that it is "in addition to" other statutes. The Court then held that "the forfeiture provisions of the RICO act do not prevent forfeiture under other applicable statutory forfeiture provisions." $52,029, supra, 284.

The United States Supreme Court has specifically held that when a forfeiture statute contains no exception for attorney fees, no such exception is required by the Sixth Amendment of the United States Constitution. Caplin & Drysdale Chartered v U.S., supra, U.S. v Monsanto, supra. The Supreme Court noted that forfeiture statutes are enacted to give force to the adage that "crime does not pay" and that Congress did not intend that the adage should be modified to read "crime does not pay except for attorney fees." U.S. v Monsanto, supra, 614.

The People's first forfeiture complaint in this case is independently based upon MCL 333.7521 of the Controlled Substances Act. All of the assets involved in this case are subject to forfeiture pursuant to the Controlled Substances Act. The trial court recognized it's duty in this

case to keep intact all of the seized assets so that they may be awarded undiminished to the rightful owner of the assets.

The interests of the attorneys in this case have arisen *after* the seizure of the currency or the freezing of the various bank accounts. In In Re Forfeiture of $109,901, 210 Mich App 191 (1995), the Court of Appeals held as follows:

> "By contrast, the validity of competing claims of ownership is determined by whether the property became 'subject to forfeiture' by reason of acts 'committed or omitted without the owner's knowledge or consent.' (statutory citation omitted) **Because the property becomes 'subject to forfeiture' before the seizure, this section clearly presupposes that competing ownership interests must exist, if at all, before the seizure. Thus, both the validity of competing claims is determined by reference to facts occurring before seizure."** (Emphasis supplied.) In Re Forfeiture Of $109,901, supra, 194.

Claimants' attorneys are barred under the Controlled Substances Act from asserting claims of a right to the seized funds, when such claims for payment of fees did not come into existence until after seizure of the property.

The People's forfeiture complaint in this case is independently based upon MCL 333.7521 of the Controlled Substances Act. The Controlled Substances Act contains no exception for assets which a defendant intends to pay to an attorney. All of the assets involved in this case are subject to forfeiture pursuant to the Controlled Substances Act. The trial court correctly ruled that all of the seized assets should be kept intact so that they may be returned undiminished to their rightful owner. The Court of Appeals erred in holding that assets subject to forfeiture pursuant to the Controlled Substances Act may be released pursuant to the Criminal Enterprises Act to pay the Claimants' attorney fees.

C. The Trial Court Ruled Correctly That Assets Which Have Been Seized By The Government And Are The Subject Of A Forfeiture Action Brought Pursuant To The Criminal Enterprises Act May Not Be Released To Pay The Attorney Fees For The Defense Of The Forfeiture Action.

The trial court in its Opinion And Order of February 23, 1999, (79a -80a) interpreted MCL 750.159m(6) of the Criminal Enterprises Act which reads as follows:

> "**750.159m. Proceeds of racketeering, real, personal, or intangible property; subject to civil in rem forfeiture: exceptions, primary residence of spouse, land contract vendors, reasonable attorney fees, conditions.**
>
> Sec. 159m. (1) Except as otherwise provided in this section, all real, personal, or intangible property of a person convicted of a violation of section 159i that is the proceeds of racketeering, the substituted proceeds of racketeering, or an instrumentality of racketeering, is subject to civil in rem forfeiture to a local unit of government or the state under this section and sections 159n to 159q.
>
> * * *
>
> (6) Reasonable attorney fees for representation in an action under this chapter are not subject to civil in rem forfeiture under this chapter." MCL 750.159m(6).

The Legislature's stated reasons for enacting the Criminal Enterprises Act are contained in the legislative history of that act. A strong argument for the Criminal Enterprises Act was set forth as follows in a Senate analysis of the proposed act.

> "A key element in these criminal Enterprises statutes is the ability to seize the proceeds, substituted proceeds, and instruments of continued criminal activity. Many people feel that, because criminal activity often involves continued illegal activities carried out for the profit of those involved, Michigan should enact a statute to address continuing criminal Enterprises and **to enable law enforcement agencies to seize the proceeds and the results of proceeds of organized, continued patterns of illegal activity**." (Emphasis supplied).
>
> SFA Bill Analysis of 6/1/95, p.1. (106a).

A House report analyzing the proposed act stressed the importance of the forfeiture provisions as follows:

> "More importantly, **the bill would free the state from reliance on federal prosecutorial priorities and enable forfeited crime proceeds to stay with Michigan agencies.** Those proceeds can be considerable, meaning that asset forfeiture provisions offer not only the potential to recover significant sums for the war on crime, but also the potential to reduce financial incentives for crime by making the financial risks commensurate with the perceived financial benefits. **With asset forfeiture, crime does not pay. Asset forfeiture is a key element of the RICO concept, enabling authorities to dismantle an organization that might otherwise survive the conviction of a few of its members."** (Emphasis supplied).
>
> H.L.A.S. of 1-12-96, pp. 5. (104a).

Therefore, two of the primary objectives of the Criminal Enterprises Act were that state agencies should not have to seek prosecution of criminal enterprises through federal statutes and agencies, and that profits of illegal activities should be forfeited to Michigan agencies, not sent to federal agencies.

The legislative history is silent as to the meaning of subparagraph 6. This Court has set forth how a statute should be construed when the meaning of a portion of the statute is unclear. In the case of In Re Forfeiture Of $5,264, 432 Mich 242 (1989), this Court stated that rule of statutory construction as follows:

> "The issue before the Court is one of statutory construction. Our primary goal in interpreting MCL 333.7521; MSA 14.15(7521) is to ascertain and give effect to the intent of the Legislature in enacting the statute. If the language of a statute is unambiguous, the intent must be determined accordingly, and no judicial interpretation is warranted. City of Livonia v Dep't of Social Sevices, 423 Mich 466, 487; 378 NW2d 402 (1985); Dussia v Monroe Co Employees Retirement System, 386 Mich 244, 249; 191 NW2d 307 (1971); Melia v Employment Security comm, 346 Mich 544, 562; 78 NW2d 273 (1956). **However, where statutory language is of doubtful meaning, a court must look to the**

> **object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose.** State Treasurer v Wilson, 423 Mich 138, 144; 377 NW2d 703 (1985); Lakehead Pipe Line Co v Dehn, 340 Mich 25, 35; 64 NW2d 903 (1954)." (Emphasis supplied).
>
> In Re Forfeiture Of $5,264, supra, 248.

In State Treasurer v. Wilson, 423 Mich 138; 145 (1985), this Court stated:

> "A statute must be read in it's entirety and the meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole." (Citation omitted)

This Court has also long stressed that the literal construction of the words of a statute will not be used when such an interpretation is contrary to the apparent intent of the Legislature. State Treasurer v Wilson, supra, 145; LA Darling Co v Water Resources Comm, 341 Mich 654; 662 (1955); People v Lynch, 410 Mich 343; 354 (1981). This Court stated that rule of statutory construction in the case of Attorney General v Detroit U Ry, 210 Mich 227 (1920) as follows:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."
>
> Attorney General v Detroit U Ry, supra, 254.

A correct determination of the intent of subparagraph six requires an analysis of MCL 750.159m, so that a single subparagraph is not taken out of context. The People contend that, when taken in context with the preceding paragraphs that define a claimant's standing to avoid forfeiture based on whether the claimant had knowledge or consented to illegal acts, subparagraph six was meant to establish that a lawyer, when receiving funds for payment of legal services, may have knowledge that those funds came from illegal sources, and yet avoid forfeiture if the government files a forfeiture action to seize the funds paid to the law firm.

Subparagraph one of MCL 750.159m describes the kinds of assets that are to be forfeited. It generally sets forth that any property, regardless of its classification as "real," "personal" or "intangible" can be forfeited. It then describes the manner in which the property was acquired or used to commit racketeering that subjects it to forfeiture. (Instrumentality of the crime, proceeds of the crime, or substituted proceeds):

> "Sec. 159m. (1) Except as otherwise provided in this section, all real, personal, or intangible property of a person convicted of a violation of section 159i that is the proceeds of racketeering, the substituted proceeds of racketeering, or an instrumentality of racketeering, is subject to civil in rem forfeiture to a local unit of government or the state under this section and sections 159n to 159q." MCL 750.159m(1)

Subparagraphs two through six set forth the categories of claimants, other than the convicted racketeer, who may have property interests in the property subject to forfeiture. The categories of claimants include spouses, dependent minor children, property owners, secured interest holders, land contract vendors, and attorneys. The People contend that these paragraphs were also intended to identify the requisite *mental states* regarding knowledge of these claimants. These subparagraphs determine whether claimants can prevail on their claims, depending on whether the particular claimants had knowledge of the criminal activity, and whether they consented to the acts that gave rise to forfeiture. The subparagraphs specify whether a claimant must have lacked knowledge of the illegal acts, whether he/she did not consent, or if it must be shown that the claimant lacked knowledge *and* did not consent.

Subparagraph two pertains to spouses and dependent minor children, and their claims for the "primary residence:"

> "(2) Real property that is the primary residence of the spouse of the owner is not subject to civil in rem forfeiture under this section and sections 159n to 159q, unless that spouse had prior actual

> knowledge of, and consented to and participated in the commission of, the racketeering activity. Real property that is the primary residence of a dependent minor child of the owner is not subject to civil in rem forfeiture under this section and sections 159n to 159q." MCL 750.159m(2)

The subparagraph indicates that when a forfeiture *against the residence* has been filed, a spouse must have had knowledge, consented to *and participated* in the racketeering activity. Therefore, a spouse can know and consent to the illegal acts of the racketeer, and yet not suffer forfeiture of the residence. The Legislature recognized that in some marital relationships, a spouse may know of the acts, but be in a situation where she/he is unable to intervene or stop the racketeer from continuing the acts. The Legislature also recognized that a spouse might be unable or unwilling to report (i.e. serve notice of) the illegal acts to law enforcement authorities, and thereby jeopardize their health or safety for reporting their husband/wife to police. Thus, the Legislature determined that a spouse would not risk the loss of the residence unless she/he *actually participated* in the commission of the racketeering activity to some degree.

Subparagraph two absolutely bars forfeiture of the primary residence of a minor child. Therefore, a child could know, consent to, and actually participate in the racketeering activity, but still not face the forfeiture of his/her residence:

Subparagraph three pertains to "owners." This paragraph would also apply to the claims of spouses and children when contesting forfeiture of real or personal property other than the primary residence:

> "(3) Property is not subject to civil in rem forfeiture if either of the following circumstances exists:
>
> (a) The owner of the property did not have prior actual knowledge of the commission of the racketeering activity.

> (b) The owner of the property served notice of the commission of the crime upon an appropriate law enforcement agency." MCL 750.159m(3)

The requisite mental state for owners is that they *cannot have known* about the illegal acts. If they knew of the illegal acts, it is *irrelevant whether they consented*, since unlike the preceding subparagraph, subparagraph three is silent regarding consent. The Legislature appears to have recognized that an owner may be unable themselves to stop illegal racketeering activity committed by another using property of the owner, however it has given the owner who acquires knowledge of the racketeering activity an option to avoid forfeiture of the property by serving notice to a law enforcement agency of the commission of the crimes. It is not enough that an owner did not consent to the crime. They have an affirmative duty and must take the next step of reporting it to police.

The next category of claimants is secured interest holders, and is addressed in subparagraph four:

> "(4) The civil in rem forfeiture of property encumbered by a security interest is subject to the interest of the holder of the security interest who did not have prior actual knowledge of the racketeering activity." MCL 750.159m(4)

If a secured interest holder lacks knowledge of the racketeering activity, their interest is protected. (This does not prevent the forfeiture of the property, however their secured interest in the property is paid out of the proceeds from the sale of the forfeited property, pursuant to MCL 750.159r). As in the preceding paragraph, if the secured party knows of the racketeering activity, it is irrelevant whether they consent. Unlike the paragraph regarding owners, it is not a defense if they served a notice to a law enforcement agency.

The requisite mental state of a land contract holder is specified in subparagraph five:

> "(5) The civil in rem forfeiture of property encumbered by an unpaid balance on a land contract is subject to the interest of the land contract vendor who did not have prior actual knowledge of the racketeering activity." MCL 750.159m(5)

This is identical to the preceding paragraph. Although lack of knowledge will avoid forfeiture of a land contract vendor's interest, if he/she knew of the illegal acts giving rise to forfeiture of the property, whether he/she consented is irrelevant.

The final subparagraph pertains to attorneys:

> "(6) Reasonable attorney fees for representation in an action under this chapter are not subject to civil in rem forfeiture under this chapter." MCL 750.159m(6)

The paragraph is silent as to knowledge or lack of knowledge of an attorney. Therefore, it should be construed to mean that knowledge of the racketeering activity by a retained attorney will not result in forfeiture of money the attorney receives as fees or a retainer. The Legislature appears to have recognized that a lawyer who takes on the representation of a defendant in a racketeering action and accepts payment from that individual cannot reasonably claim an interest under subparagraph three that as an "owner," he or she lacked knowledge of the racketeering acts. If the government were to file a forfeiture action to forfeit any funds paid to the attorney by a racketeering defendant, the attorney would not prevail if the attorney had to claim relief under subparagraph three regarding "owners." He/she could not establish lack of knowledge. He/she could not show that he/she had served notice on the police department under subparagraph 3 (b). If the attorney had received a secured interest in real, personal or intangible property as his/her retainer, rather than cash, his/her claim as a secured interest holder under subparagraph four would similarly fail, since he/she could not establish a lack of knowledge. However, subparagraph six allows the attorney to prevent forfeiture of funds received by his/her firm

without having to fall within the stricter requirements of the preceding paragraphs regarding lack of knowledge.

When viewed in the context of the preceding paragraphs, which set forth the requisite lack of knowledge or consent requirements for other categories of claimants, the logical conclusion is that the Legislature intended to eliminate the requirement that lawyers must establish lack of knowledge before they can prevent the forfeiture of funds which they received as their fees. Thus, attorneys are the only category of claimants in which the claimant can know of the illegal acts committed by the racketeer, but still avoid the seizure and forfeiture of assets paid from ill-gotten funds. (The retainer or payments received at any time during the course of the representation.) To this extent, attorneys have been given a significant advantage over every other category of claimant. Not even the spouse or minor child are similarly protected, since their exclusion from forfeiture is limited to the primary residence, not money or personal property.

The language of subparagraph two (MCL 750.159m(2)) is similar in nature to that of subparagraph six. If, as Claimants contend, attorney fees can be paid from seized funds, subparagraph two would provide a basis for the spouse or the children of a racketeer to petition the trial court to release funds so that they may acquire a "primary residence." If Claimants are correct that seized funds can be used to pay for attorney fees arising after the date of seizure, then nothing precludes a spouse or child from moving for release of funds to pay for a newly acquired residence. It is unlikely that the Legislature would have intended that the spouse or child of a person charged with racketeering could seek out a residence after the government has already frozen or seized the funds, and use those funds to pay for the new dwelling. Claimants' interpretation, which would allow an attorney to charge his services against the seized assets, would permit such a petition.

The People submit that it cannot be seriously argued that any other claimant falling within the categories of other subparagraphs could petition the trial court to release seized funds. A secured interest holder has no right to petition the court to designate and release seized funds, which are the illegal proceeds or an instrumentality of illegal acts, to pay the amount of their secured interest in a mortgage or personal property. A land contract holder does not have the right to petition the Court to designate and release seized funds, which are the illegal proceeds or an instrumentality of illegal acts, to pay the value of their interest in a land contract. This is because secured interest holders and land contract holders receive satisfaction of their interests under MCL 750.159r. Since other claimants would be unable to file a similar petition, the logical conclusion is that Claimants' interpretation was not intended by the Legislature. Claimants' attorneys have not been given the right under subparagraph six to ask the trial court to designate that seized funds or assets, which are the illegal proceeds or an instrumentality of illegal acts, shall thereafter constitute "attorney fees."

MCL 750.159m, while defining the claimants who have legitimate rights to challenge the forfeiture of property described in subparagraph one, and setting forth the burdens regarding knowledge or lack of knowledge of the categories of claimants, was not intended to determine how forfeited (or seized) assets were to be dispersed. That section does not provide for the return of property, the satisfaction of liens, security interests, or land contracts. The distribution, return of property or satisfaction of other interests is governed by other sections of the Criminal Enterprises Act.

Two other sections of the Criminal Enterprises statute provide for the disposition of the disputed assets. MCL 750.159q states that if the claimant prevails, and the trial court does not order forfeiture:

> ". . . the property shall be returned to the owner within 28 days after a written order is entered to return the property, unless an appellate court stays the order. In addition, the prosecuting agency shall reimburse the owner for reasonable attorney fees and damages related to towing costs, storage fees and expenses, foreclosure costs, and other similar expenses." (Emphasis supplied). MCL 750.159q(4).

If the People prevail:

> "If the prosecuting agency meets the burden of proof under subsection (1) and the person claiming an ownership interest in the property does not meet the burden of proof under subsection (2), the property shall be disposed of pursuant to section 159r."
> MCL 750.159q(5)

MCL 750.159r determines how assets that are forfeited are to be distributed. In order of priority, the payment of security interests and land contract balances are made from the sale of forfeited assets. Next, restitution to victims is made, with Orders for Restitution being satisfied first, then restitution for victims not included in any Orders of Restitution. (Since racketeering includes many crimes involving robbery, theft, embezzlement etc, under MCL 750.159g, this Court should consider the implications that an interpretation which grants attorneys priority to seized assets will deny restitution to victims in those types of crimes prosecuted under the Criminal Enterprises Act.) Next, any liens imposed by government agencies are satisfied. Next, the expenses of the forfeiture action are paid. Finally, remaining funds are paid to the seizing units of government. Neither of these dispositional statutes include any reference to taking forfeited funds and using those funds to pay outstanding legal debts owed by a claimant to an attorney.

The People have found no other state which has statutory language identical to subparagraph six. However, the above proposed construction of the statute, which would identify

the status of an attorney in Michigan as a claimant who need not show lack of knowledge, is similar to North Carolina's "innocent owner" exception, which provides as follows:

> "(I) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture. An attorney who is paid a fee for representing any person subject to this act, shall be rebuttably presumed to be an innocent party as to that fee transaction."
>
> (N.C. Gen. Stat § 75D-5 (I))

The language of subparagraph six should be construed in a manner that does not nullify the entire statute as it pertains to forfeiture. The People submit that the interpretation of the Court of Appeals would nullify the intent of the statute except in rare cases involving very large sums of money, when a law firm would find it impossible to justify to the trial court that a request for exorbitant fees was reasonable.

A crucial distinction exists between assets which have been seized by the government and are already the subject of a forfeiture action, and assets which remain in the hands of the defendants or claimants in the action or come into their hands after the seizure and commencement of the forfeiture action. The People acknowledge that funds already paid to an attorney prior to the commencement of a forfeiture action brought under the C.E.A. may not be pursued by the People. Likewise, the People acknowledge that funds not already seized and named as defendant property in a forfeiture action brought under the C.E.A. may be used to pay attorneys fees. Funds, however, that *have been seized and are already the subject of a forfeiture action* brought under the C.E.A. may not be released to pay for the attorney fees in defense of the

forfeiture action. If this Court permits the Court of Appeal's interpretation of MCL 750.159m(6) to stand, this Court would eliminate one of the major objectives of the Criminal Enterprises Act.[1]

It is essential that this Court consider the practical legal significance of the interpretation of MCL 750.159m(6) argued for by the Claimants. Under the interpretation advanced by the Claimants and accepted by the Court of Appeals, defense attorneys in forfeiture cases brought under the C.E.A. would be encouraged to run up as enormous legal fees as possible. Under such circumstances, even if the trial courts held that the seized assets were the result of illegal activities and rightfully belonged to the government, the assets would have already been paid to the defense attorneys. Such a scenario would be especially true in a run-of-the-mill forfeiture action involving less than the value of the assets in this case. In a typical forfeiture case involving under $50,000, all of the assets would virtually go in an automatic fashion to the defense to pay attorney fees. Even if the People prevailed in the forfeiture action, they would gain no assets as a result of their efforts to enforce the Criminal Enterprises Act.

Furthermore, the People submit that historically there is a very obvious reason for the provision as to attorney fees contained in MCL 750.159m(6). Prior to 1989, there was a conflict in the federal courts as to whether the government could seek to forfeit funds paid to attorneys which were obtained by defendants through illegal activities. The United States Supreme Court resolved that conflict in the case of Caplin & Drysdale, Chartered, v United States, 491 U.S. 617 (1989). In Caplin & Drysdale, supra, the trial court had held that assets seized by the government could be released to pay the defendant's attorney fees. The United States Supreme

[1] The strategy of counsel for claimants in forfeiture cases is illustrated by this case. Eight days after the opinion of the Court of Appeals was filed in this case, counsel for the Claimants filed a motion for attorney fees seeking attorney fees in the amount of $590,000. The motion was unsupported by an itemized account of the fees.

Court held that the release of such seized assets was erroneous. Indeed, the United States Supreme Court held that the government had the right to recapture forfeitable assets transferred to third parties. Caplin & Drysdale, supra, 622-623. The United States Supreme Court stressed that from the time at which the defendant obtained the assets illegally, the right, title and interest in those assets vested in the government, that the defendant had no right to convey the assets and that a third party had no right to receive the assets. Caplin & Drysdale, supra, 627.

The United States Supreme Court categorically rejected the argument made by the third party attorney in Caplin & Drysdale, supra, that the ends of the forfeiture statute were achieved when the defendant's forfeitable assets were paid to an attorney. The Supreme Court emphasized that the government had a pecuniary interest in recovering *all* forfeitable assets to support law enforcement efforts in a variety of important ways. The government also had the right as the "rightful owner" of forfeitable assets to recover the undiminished forfeitable assets in full. Finally, the Supreme Court rejected the contention that a drug dealer had a constitutional right to use his illegal proceeds to finance an expensive defense. Caplin& Drysdale, supra, 629-630.

The People submit that MCL 750.159m(6), adopted after the decision in Caplin & Drysdale, supra, was intended to clarify that assets of a defendant in a forfeiture action, which had not already been recaptured by the government and made a subject of the forfeiture action, could be used by the defendant to pay attorney fees. The same would be true of assets acquired by the defendant after commencement of the forfeiture action. Any other interpretation of MCL 750.159m(6) would defeat a major objective of the Michigan Legislature in enacting the entire Criminal Enterprises Act.

The People's interpretation of MCL 750.159m(6) finds strong support in law because attorneys defending forfeiture actions have an effective legal remedy under the People's interpretation. Defense attorneys can obtain a lien upon the forfeitable assets. If the trial court ultimately rules for the claimants, the attorneys can obtain their fees. If the People prevail, neither the claimants nor the attorneys ever had any legal right to the assets.

In United States v Nichols, et al, 841 F2d 1485 (10th Cir. 1988), the United States Court of Appeals included an analysis of the attorney fees issue in an opinion that preceded the Supreme Court's decision in Caplin, supra. The Nichols Court noted that the applicable federal statute contains a "relation back" provision. The government's interest in the property vests at the time that the crime is committed which subjects the property to forfeiture. Even if the defendant has transferred assets to a third party, the government can pursue those assets and seek forfeiture. The third party has the opportunity to prove at a hearing that he is a bona fide purchaser for value of the property at the time of the purchase, and was reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. 853(c)

The Court in Nichols, supra, noted "An attorney representing a defendant is unlikely to qualify for an exemption from forfeiture because he or she is not 'reasonably without cause to believe that the property was subject to forfeiture.' 21 U.S.C. 853(c). What property is subject to forfeiture is specified in the indictment, so an attorney is uniquely likely to know that there is a claim pending against the property." Nichols, supra, at 1493, fn 5.

Claimants' interpretation of subparagraph six, when followed to its logical conclusion, would lead to results directly contrary to the purposes set forth in the legislative history. If attorney fees must be paid from the seized property in this case, then the attorney fees must be paid in all forfeiture cases arising under the Criminal Enterprises Act. All but a few forfeiture

cases involve assets that are valued at less than $50,000. Most cases will involve assets valued at less than $20,000. Only one other reported Michigan forfeiture case has involved a sum exceeding one million dollars. In re Forfeiture of $1,159,420, 194 Mich App. 134 (1992). As shown by the motion filed in the instant case requesting payment of over $500,000, it would not be difficult for defense attorneys to quickly deplete the full value of most forfeiture actions long before the trial date.

Claimants argued in their brief on appeal in the Court of Appeals that forfeiture laws are to be strictly construed to avoid forfeiture, citing People v 2850 Ewing Road, 161 Mich App 266 (1987). The "strained construction" of the drug forfeiture statute used by the Ewing Road panel was definitively and decisively disapproved by this Court in In re Forfeiture of $5,264, 432 Mich 242, 252-255 (1989) and every other appellate panel that has considered the issue since this Court's decision. Since the drug forfeiture provision is part of the Controlled Substances Act, the forfeiture provisions are to be liberally construed to accomplish the goals set forth by the Legislature concerning that statute. In Re Forfeiture of $5,264, supra, 258. Similarly, the Legislature set forth in MCL 750.2 that the sections of the Penal Code are to be construed "according to the fair import of their terms, to promote justice and to effect the objects of the law."

Claimants also relied upon United States v Unimex, 991 F2d 546 (9th cir. 1993), and United States v Noriega, 746 F.Supp. 1541 (S.D. Fla 1990) in support of their position. Unlike the present case, both of those cases were criminal prosecutions. In Unimex, supra, a corporation was charged and convicted. The United States Court of Appeals held that the corporation had been denied its Sixth Amendment Right to Counsel when seized assets were not released to permit the corporation to retain counsel. The United States District Court's decision

in Noriega, supra, was also based on the Sixth Amendment. These cases are inapposite, since the Sixth Amendment is not applicable to civil forfeiture cases. In United States v $100,375 in U.S. Currency, 70 F 3d 438 (6th Cir. 1995), the Sixth Circuit Court of Appeals stated: "We also find that the Sixth Amendment right to counsel does not apply to civil forfeiture proceedings." Id at 440. The Court cited Austin v United States, 113 S. Ct. 2801 (1993) wherein the United States Supreme Court stated that some provisions of the Bill of Rights are expressly limited to criminal cases and that the Sixth Amendment protections are explicitly confined to criminal prosecutions. Similarly, in United States v West Grant Avenue, 15 F.3d 632 (7th Cir. 1994), the United States Court of Appeals held that the Supreme Court had not extended the right to counsel to forfeiture proceedings. See also United States v 415 Mitchell Avenue, 149 F 3d 472, fn 1 (6th Cir 1998): ("Claimant includes an ineffective assistance of counsel claim based on this conduct. This court has unequivocally held, however, that there is no Sixth Amendment right to counsel in a civil forfeiture proceeding . . ." (Citation omitted).

The People concede that if funds were to be paid to a law firm while the forfeiture is pending, from sources of funds not seized or frozen, those funds would not be subject to forfeiture, even if the government might later prove that the attorney fees were traceable to illegal acts. The Legislature did not intend for a law firm to have to surrender funds it had already received. Under federal statutes and case law, seizure and forfeiture of fees paid to an attorney or a law firm would be permissible. See United States of America, v Moffitt, et al. 83 F.3d 660; (4th Cir. 1996). Under the trial court's and the Peoples' interpretation, the legislative intent to forfeit the assets and to make sure that crime does not pay can be fulfilled, while at the same time subparagraph six can be construed in a manner that addresses concerns of the defense bar. If a person discovers he/she is facing charges or a forfeiture action under the racketeering

statute, he/she could hire a lawyer and make a payment or retainer. Those funds received by the lawyer would not be subject to forfeiture at the conclusion of the action. This distinguishes the Michigan statute from its federal counterpart, under which payments previously made to attorneys can be seized retroactively and forfeited.

The interpretation of MCL 750.159m(6) adopted by the County of Appeals would nullify the objectives of the Criminal Enterprises Act. Read in its entirety, it is inconceivable that the Legislature intended that the Criminal Enterprises Act result in the conveyance of illegal assets to defense attorneys rather than to the rightful owners, the People of the State of Michigan. The trial court correctly interpreted MCL 750.159m(6) in such a manner as to recognize the Legislature's intent in adopting the entire Criminal Enterprises Act. This Court should reverse the decision of the Court of Appeals and reinstate the Opinion And Order of the trial court that the assets already the subject of the pending forfeiture action may not be used for the purpose of financing the defense of the forfeiture action.

II. MCL 750.159M(6) DOES NOT REQUIRE THE TRIAL COURT TO GRANT A MOTION TO RETURN SEIZED PROPERTY TO PAY REASONABLE ATTORNEY FEES PRIOR TO THE FINAL FORFEITURE DETERMINATION.

The trial court ruled correctly that the seized assets should not be used to pay the Claimants' attorney fees prior to a final determination of this forfeiture action. The Court of Appeals erroneously reversed the ruling of the trial court and held that the Claimants' attorney fees should be paid from the seized assets. **The standard of review for this question of law is de novo review. People v Sierb, 456 Mich 519; 522 (1998).**

As set forth in Issue I of this brief, the People believe that the Legislature in drafting MCL 750.159m(6) did not intend that attorney fees of claimants in a civil forfeiture should be paid out of assets seized by the government that are the subject matter of the forfeiture. Rather, the Legislative intended to permit attorneys for claimants to retain fees already paid to them prior to the filing of the forfeiture action, even if the fees were paid with money subject to forfeiture. The right of attorneys to retain those fees under Michigan law is in direct contrast to federal law. Caplin & Drysdale, Chartered v United States, supra, 622-623.

If this Court were, however, to determine that the Claimants in this case were entitled to reasonable attorney fees pursuant to MCL 750.159m(6), the People submit that a rational interpretation of the entire Criminal Enterprises Act directs that such attorney fees be paid at the completion of the forfeiture action. MCL 750.159m contains no provision as to when such attorney fees should be paid. MCL 750.159q(4) provides for reasonable attorney fees for claimants if the prosecution fails in its burden of proof as to the criminal nature of seized assets. MCL 750.159q(4) specifically provides that such payment of attorney fees should occur upon the completion of the forfeiture action. Payment of attorney fees at that time makes sense, as at that point the trial court is in the best position to determine what constitutes reasonable attorney fees.

MCL 750.159m(6) is a general statutory provision that does not specify when any attorney fees should be paid. MCL 750.159q(4) is a more specific statutory provision that states attorney fees should be paid upon the completion of the forfeiture action, if the prosecutor does not prevail. This Court presumes that each provision of a statute has some meaning and avoids any statutory construction that would render any part of the statute surplusage or nugatory. People v Borchard-Ruhland, 460 Mich 278; 285 (1999). This Court should follow the plain meaning of MCL 750.159q(4) and hold that any attorney fees to be paid to the Claimants in this case would be paid upon the completion of the forfeiture action in the trial court.

CONCLUSION

This Court should hold that none of the seized assets should be used to pay the Claimants' attorney fees as all those assets are subject to forfeiture under the Controlled Substances Act. This Court should interpret MCL 750.159 to mean that attorneys for Claimants can retain fees paid from ill-gotten assets, but may not receive fees from seized assets subject to forfeiture. This Court should hold that any payment of attorney fees should occur upon the completion of the forfeiture action.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Robert C. Williams, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to reverse the decision of the Michigan Court of Appeals and to reinstate the Opinion And Order of February 23, 1999, of the Oakland County Circuit Court.

Respectfully Submitted,

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